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FILED
01/18/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0528-R-2022
Lambert, Kathryn
11.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Newberry Family LLC III

CASE 43B-0528-R-2022

43B 32238-00

43B 32239-00

43B 39278-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 32238-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

Claim 43B 32239-00 appeared in the Preliminary Decree with the following issue remark:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE SENESE SEC 10 TWP 5S RGE 9E PARK COUNTY.

Claim 43B 39278-00 appeared in the Preliminary Decree with the following issue remark:

THE POINT OF DIVERSION LEGAL LAND DESCRIPTION COULD NOT BE REFINED FROM INFORMATION IN THE CLAIM FILE.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence. On January 11, 2022 the Order Consolidating Case And Order Setting Filing Deadlines Pursuant To Section 85-2-248(5), MCA was issued. On July 29, 2022 the DNRC Memorandum was filed making recommendations. On August 16, 2022 the Order Setting Filing Deadlines was issued requesting clarification of the recommendations. On September 30, 2022 the DNRC filed a second Memorandum. On November 10, 2022 Newberry Family LLC III filed its response stating that it agrees with the recommendations in both of the DNRC Memorandums. The settlement documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. For claim 43B 32238-00, the Preliminary Decree states that the source is UNNAMED

TRIBUTARY OF ELBOW CREEK. The source should be KAUFFMAN CREEK.

The Preliminary Decree states that the point of diversion legal description is the SESESE section 10, T5S, R9E, PARK. The legal description should be the SENESE section 10, T5S, R9E, PARK. The point of diversion issue remark should be removed as addressed and resolved.

2. For claim 43B 32239-00, the Preliminary Decree states that the place of use legal description is the SESESE section 10, T5S, R9E, PARK. The legal description should be the NESENE section 10, T5S, R9E, PARK. The place of use issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following notice remark:

POINT OF DIVERSION AND SOURCE NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This remark provides notice of these changes made prior to issuance of the Preliminary Decree and does not raise unresolved issues which need to be addressed. The remark should be removed as having served its notice purpose.

3. For claim 43B 39278-00, the point of diversion legal description does not require change. The point of diversion issue remark should be removed as addressed and resolved.

CONCLUSION OF LAW

The information provided by the DNRC and claimant is sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Newberry Family LLC III
107 Elbow Creek Rd
Livingston, MT 59047

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 32238-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: NEWBERRY FAMILY LLC III
107 ELBOW CREEK RD
LIVINGSTON, MT 59047

Priority Date: SEPTEMBER 30, 1880

Type of Historical Right: USE

Purpose (use): IRRIGATION
Irrigation Type: SPRINKLER/FLOOD

***Flow Rate:** 296.00 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 17.50

Source Name: KAUFFMAN CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENESE	10	5S	9E	PARK

Period of Diversion: MAY 1 TO NOVEMBER 15

Diversion Means: HEADGATE

Period of Use: MAY 1 TO NOVEMBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.50		NESENW	10	5S	9E	PARK
2	6.00		NWSWNE	10	5S	9E	PARK
3	6.00		NENESW	10	5S	9E	PARK
4	2.00		SESENW	10	5S	9E	PARK
Total:	17.50						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

7347-00

7348-00

7349-00

32238-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

32236-00

32238-00

32239-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 32239-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: NEWBERRY FAMILY LLC III
107 ELBOW CREEK RD
LIVINGSTON, MT 59047

Priority Date: SEPTEMBER 30, 1880

Type of Historical Right: USE

Purpose (use): DOMESTIC

Flow Rate: 25.00 GPM

Volume: 6.00 AC-FT

Households: 2

Maximum Acres: 2.00

Source Name: KAUFFMAN CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENESE	10	5S	9E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	2.00		NESENW	10	5S	9E	PARK

Total: 2.00

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

32236-00 32238-00 32239-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 39278-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: NEWBERRY FAMILY LLC III
107 ELBOW CREEK RD
LIVINGSTON, MT 59047

Priority Date: DECEMBER 31, 1887

Type of Historical Right: USE

Purpose (use): IRRIGATION
Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 337.00 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 47.50

Source Name: UNNAMED TRIBUTARY OF ELBOW CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSENW	11	5S	9E	PARK

Period of Diversion: MAY 1 TO NOVEMBER 15

Diversion Means: HEADGATE

Period of Use: MAY 1 TO NOVEMBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	15.00		SWSW	3	5S	9E	PARK
2	25.00		SESW	3	5S	9E	PARK
3	4.00		S2SWSE	3	5S	9E	PARK
4	3.50		N2NWNE	10	5S	9E	PARK
Total:	47.50						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

7351-00

7352-00

39278-00